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IN THE

Supreme Court of the United States

TOWN OF MIDDLEBURY, CONNECTICUT, *et al.*,

Petitioners,

v.

GOODRICH CORP., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

CHRISTOPHER P. MCCORMACK
Counsel of Record
TYLER COOPER & ALCORN, LLP
205 Church Street
New Haven, CT 06509-1910
(203) 784-8200

Attorneys for Respondents Members of the Laurel Park Coalition

DAVID E. ROSENGREN
PEPE & HAZARD, LLP
Goodwin Square
Hartford, CT 06103-4302
(860) 522-5175

Attorneys for Respondents Members of the Beacon Heights Coalition

Attorneys for Respondents

180751

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondents respectfully submit this Corporate Disclosure Statement.

Members of the Laurel Park Coalition:

Uniroyal Chemical Company, Inc. is a wholly-owned subsidiary of Crompton Corporation, a publicly held company.

Kerite Company is a wholly-owned subsidiary of Marmon Holdings, Inc. No publicly held company owns 10% or more of the company's stock.

Unisys Corporation has no parent company and no publicly held company owns 10% or more of the corporation's stock.

Risdon-AMS (USA), Inc. is a wholly-owned subsidiary of Crown Holdings, Inc., a publicly held company.

Cadbury Beverages, Inc. is a wholly-owned subsidiary of A&W Concentrate Company. A&W Concentrate Company is a wholly-owned subsidiary of A&W Brands, Inc. A&W Brands, Inc. is a wholly-owned subsidiary of CBI Holdings, Inc. CBI Holdings, Inc. is a wholly-owned subsidiary of Cadbury Schweppes Holdings, Inc. Cadbury Schweppes Holdings, Inc. is a wholly-owned subsidiary of Cadbury Schweppes Holdings, LLC. Cadbury Schweppes Holdings, LLC is owned by Cadbury Schweppes Investments BV, Bruton Lane Holdings, Inc. and Cadbury Schweppes Overseas Limited. Cadbury Schweppes Investments BV is a

wholly-owned subsidiary of Cadbury Schweppes Investments (Netherlands Antilles) NV. Cadbury Schweppes Investments (Netherlands-Antilles) NV is a wholly-owned subsidiary of Cadbury Schweppes Investments (Jersey) Limited. Cadbury Schweppes Investments (Jersey) Limited is a wholly-owned subsidiary of Cadbury Schweppes Overseas Limited. Cadbury Schweppes Overseas Limited is a wholly-owned subsidiary of Vantas International Limited. Vantas International Limited is a wholly-owned subsidiary of Cadbury Schweppes Public Limited Company.

Goodrich Corporation has no parent company and no publicly held company owns 10% or more of the corporation's stock.

Naugatuck Glass Co. is a wholly-owned subsidiary of Apogent Technologies, Inc. No publicly held company owns 10% or more of the company's stock.

Naugatuck Treatment Co. is a wholly-owned subsidiary of Uniroyal Chemical Company, Inc. No publicly held company owns 10% or more of the company's stock.

BP America, Inc. has no parent company and no publicly held company owns 10% or more of the corporation's stock.

Members of the Beacon Heights Coalition:

Uniroyal Chemical Company, Inc. is a wholly-owned subsidiary of Crompton Corporation, a publicly held company.

Goodrich Corporation has no parent company and no publicly held company owns 10% or more of its stock.

Reynolds Metals Company is a wholly-owned subsidiary of Alcoa, Inc. No publicly held company owns 10% or more of the company's stock.

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COUNTER-STATEMENT OF THE CASE

Respondents Laurel Park Coalition and Beacon Heights Coalition incurred response costs remediating two Superfund sites in Naugatuck and Beacon Falls, Connecticut. Pursuant to Section 113(f) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9613(f), they asserted contribution claims against Petitioners based on Petitioners' disposal at the sites of significant amounts of municipal solid waste (MSW) containing CERCLA "hazardous substances."

Petitioners contended that no percentage of response costs should be allocated to them because their MSW contained low levels of hazardous substances. Following evidentiary hearings before a special master ("Master") appointed pursuant to Fed. R. Civ. P. 53, the United States District Court for the District of Connecticut ("District Court") rejected this position and allocated shares to the individual Petitioners. The United States Second Circuit Court of Appeals affirmed in pertinent part. *Goodrich Corp. v. Middlebury*, 311 F.3d 154 (2d Cir. 2002), Petitioners' Appendix ("Pet. App.") at 1a-40a.

Much of the case's history is set forth in Petitioners' "Statement of the Case," the Second Circuit's decision, and the District Court's two opinions, Pet. App. 41a-75a and 76a-91a. This Counter-Statement addresses aspects of the record and proceedings below that are crucial to the merits, but which Petitioners omit from their Statement of the Case.

A. The Actions of the District Court and Master

1. The District Court Reserved Allocation

Petitioners assert that the District Court "delegated the allocation task to a special master pursuant to Fed. R. Civ. P. 53," Petition ("Pet.") at 14. But as the Second Circuit held, this assertion is belied by the Order of Reference to the Master, Pet. App. 92a-95a.

> [I]n referring the case to the Master the district court clearly reserved to itself the power to allocate response costs among the parties according to the equitable factors *it*, not the Master, found appropriate to the case.
>
> The Master himself acknowledged this on several occasions. For example, he advised the parties that "the ultimate question to be decided in this case, under § 113[f], is almost unpredictable, except to the extent that you can judge what Judge Dorsey believes to be a reasonable set of equitable factors. . . ." Likewise, the Master stated "I don't decide what equitable factors are equitable factors. . . . [T]he statute places the broadest possible discretion in the hands of Judge Dorsey and not me. And the statute specifically says equitable factors that he deems to be appropriate, not that I deem to be appropriate." Thus, the Master understood what the Order of Reference made apparent: that the district court reserved the right to determine the appropriate equitable factors to apply, and the

> appropriate allocation of response costs among the parties . . . .

311 F.3d at 169, Pet. App. at 21a-22a (citations omitted). The Second Circuit rejected Petitioners' interpretation as a "loose reading . . . inconsistent with the Order's terms and even with the Master's understanding of his role in the case." 311 F.3d at 169, Pet. App. at 21a.

2. The Master Failed to Make Adequate Findings

Of the Master's Report, Petitioners state only that, "[i]n sum, based on the equitable factors he identified, the [Master] recommended that the district court allocate no remediation costs to the municipal defendants." Pet. at 5. This description fails to acknowledge that the Master neglected to address extensive evidence, much of it undisputed, on issues material to equitable allocation under CERCLA Section 113(f).

The evidence, as Petitioners acknowledge, was compiled "over a six-month period" and included extensive testimony and more than five hundred exhibits. Pet. at 5. The Report, *see* Pet. App. 96a-117a, is remarkable on its face for mentioning virtually none of this record.

Particularly glaring was the Report's omission of findings concerning the volume of waste disposed of by Petitioners. Because this case involved responsibility for waste disposal, much of the hearing record consisted of documentary and testimonial party-specific waste volume evidence. The Second Circuit characterized the Master's failure to address this evidence as "curious." 311 F.3d at 165, Pet. App. at 13a.

The Master also made no findings about Petitioners' own allocation evidence. As the Second Circuit explained, Petitioners presented "an alternative . . . allocation formula" which "allocated percentage shares of response costs" *to Petitioners* at the Laurel Park and Beacon Heights sites. *See* 311 F.3d at 164, Pet. App. at 11a. Petitioners effectively admitted, in other words, that *some* allocation should be made to them. The Master made no mention of this crucial admission. Nor did he acknowledge that the Petitioners' allocation witness agreed that "the amount of waste dumped at a landfill will affect the size and attendant cost of the cap." 311 F.3d at 164, Pet. App. at 12a.

The Master made only fragmentary findings as to the waste Respondents contributed to the sites. As the Second Circuit observed, he

> provided only scant details of the volume of waste dumped by the Coalitions, limiting his findings in this regard to the amount of waste dumped by [one] BHC member [Uniroyal] . . . at Beacon Heights from 1947 to 1976. For the better part of his Report, he did not differentiate between Beacon Heights and Laurel Park, and he spoke of the Coalitions and their wastes in general terms.

311 F.3d at 164, Pet. App. at 12a-13a.

The Master made no findings whatever on response actions or associated costs.

3. The District Court Supplemented the Master's Factual Findings

Petitioners state that the District Court rejected "very few" of the Special Master's findings. Pet. at 5. In fact, the District Court rejected none of the Master's genuine findings of fact. Rather, the District Court added factual findings on matters the Master failed to address. In its two opinions, Pet. App. 41a-75a and 76a-91a, the District Court undertook the conscientious, detailed consideration of the record that the Master failed to deliver. The only "findings" the District Court rejected were those premised, as discussed below, on errors of law.

The District Court made detailed findings as to the type and volume of waste disposed of by all parties, *see* Pet. App. 48a-50a (Laurel Park parties), *id.* at 45a-48a (Beacon Heights parties), allocation evidence and potential equitable allocation factors, *id.* at 63a-66a, and response costs, *id.* at 69a-74a. The District Court supplemented the Report's findings or provided critical qualifying details on other points as well, including the following:

- Petitioners' MSW contained CERCLA hazardous substances. Pet. App. 53a-54a.

- Even landfills used solely for disposal of MSW produce leachate containing CERCLA hazardous substances. Pet. App. 53a.

- Having found that Petitioners disposed of substantial volumes of MSW, the District Court noted that the extent of a landfill cap, and hence remediation cost, is partly a function of waste volume. Pet. App. 61a.

- The "greater bulk" of Uniroyal wastes "was comparable to MSW." Pet. App. 49a. The Master did not find otherwise.

- "The evidence does not permit the conclusion that HS [hazardous substances] from one or more particular waste streams caused or necessitated specific remediation." Pet. App. 55a. Petitioners thus failed to prove the CERCLA defense of divisible harm.

- Petitioners' own allocation evidence "suggest[ed] that some allocation [to petitioners] is appropriate." Pet. App. 63a.

- Remedial actions at the sites were consistent with the National Contingency Plan (NCP). Pet. App. 44a. Except to the extent expressly found otherwise, costs were also consistent with the NCP. *Id.* at 66a-73a.

Petitioners do not claim that the District Court's additional findings were erroneous.

4. The District Court Corrected the Master's Legal Errors

The District Court also corrected the Master on two central legal issues: the nature of proof necessary to sustain a contribution claim under CERCLA § 113(f), and the effect of classifying a given waste as "hazardous."

The Master had held Respondents to a burden of proving that Petitioners' wastes "incurred" (caused) specific remediation costs. This notion of party-specific cost causation

is a virtual *idée fixe* in the Report. *See, e.g.*, Pet. App. 106a (MSW does "not incur the costs to remediate the damage done by" Respondents' wastes); *id.* at 111a ("what particular waste of any single [Petitioner] incurred costs"). The Master treated cost causation as a *sine qua non* of § 113 contribution. *See id.* at 107a ("how could a court allocate costs to the disposal of a particular waste if there is no evidence . . . on how its disposal added to the costs . . . ?"), *id.* at 111a (noting lack of waste-specific cost linkage and purporting to "find" no basis on which to allocate any portion of costs to Petitioners). The Master ultimately treated this factor as dispositive: stating that petitioners' wastes "did not incur [cause] response costs," his Report concluded that "this finding disposes of all of the remaining claims of the . . . [Respondents] at Laurel Park." *Id.* at 114a.

Though couched as "findings," these statements followed from and depended on the legal view that waste-specific cost causation is necessary for § 113 allocation. The District Court reversed the Master on this pivotal issue, holding that contribution would not be precluded "for want of proof that a PRP's [hazardous substances] necessitated particular remediation and its attendant cost." Pet. App. 56a; *see also id.* at 57a (plaintiffs not obliged to prove that a particular defendant's hazardous substances caused incurrence of response costs). While acknowledging the appropriateness of considering whether costs to remediate MSW alone are "lesser included" costs of dealing with other wastes, the District Court expressly rejected, as a matter of law, the Master's decision to base his ultimate conclusion on this "finding," holding that the Master should not have treated it as determinative. *Id.* at 56a.

The District Court also rejected the Master's reliance on classification of waste under the Resource Conservation and Recovery Act, 42 U.S.C. § 6901, *et seq.* ("RCRA"). The Master had referred repeatedly to such classification and restrictions on disposal of "hazardous waste" as contrasted with requirements for non-hazardous waste, *see, e.g.*, Pet. App. 104a-105a, 113a, and deemed RCRA listing the "most important equitable factor to be considered by the Court," *id.* at 117a. The District Court rejected this view categorically, holding not only that the "listing" of waste as "hazardous" is not controlling for purposes of CERCLA allocation, but that it is not even a proper equitable factor. *Id.* at 60a.

Petitioners do not contend that the District Court was incorrect on these legal issues.

B. Petitioners' Failure to Request Hearing

No party asked the District Court for an oral hearing on the Master's Report under Rule 53. Petitioners Hamden, Middlebury, New Haven, Orange and Westport made no request of any kind for a hearing. Petitioner Seymour noted "oral argument requested" on the first page of its "Application for Adoption of Report of Special Master with Modifications" (Mar. 31, 1999), but did so pursuant to a local rule that requires moving parties to state whether they request argument and provides that "the Judge may, in his or her discretion, deny such request." D. Conn. Loc. Civ. R. 7(a)(1) (formerly Loc. Civ. R. 9(a)(1)).

After the District Court issued its initial decision on objections to the Master's Report, Petitioners filed a "Memorandum in Support of [Their] Motion to Alter and Amend and for Reconsideration and Rehearing of Ruling on

Report of Special Master and Objections Thereto" (Oct. 13, 1999) ("Reconsideration Memorandum"). Petitioners again noted "Oral Argument Requested" on the first page of this document, again pursuant to the local rule and without reference to Rule 53. They argued for a hearing as follows:

> The municipalities believe that a rehearing limited to allocation, the municipalities' [waste] volumes, toxicity and other relevant equitable factors should be held. *Weeks of evidence* were presented on these issues before the Special Master in accordance with the Order of Reference. . . . No evidence was presented before the Court for its consideration and evaluation. Neither does the Court's Ruling refer to any of this evidence. Therefore, the Court should allow a *rehearing on allocation to review and evaluate first hand the evidence presented* before altering [sic] the facts found by the Special Master.

Reconsideration Memorandum, at 7-8 (emphasis added).

REASONS FOR DENYING THE WRIT

The Petition should be denied for three independent reasons. First, the standard of review of allocation by the District Court is defined in this case not by general CERCLA law, but by the Order of Reference. Second, even if the standard of review for CERCLA allocation were relevant, the courts of appeals do not employ conflicting standards. Third, Petitioners did not preserve their claim regarding hearings under Rule 53.

I.

THE ORDER OF REFERENCE DEFINES THE SCOPE OF DISTRICT COURT REVIEW OF THE SPECIAL MASTER'S REPORT

It is unnecessary to reach Petitioners' first question because under the Order of Reference, the District Court expressly reserved to itself the ultimate CERCLA § 113(f) allocation decision.

The District Court confirmed by its actions that it considered itself responsible for allocation. The Master himself endorsed this interpretation, repeatedly acknowledging that it was the District Court's role, not his, to make an allocation. The Second Circuit correctly relied on these statements as confirming the meaning apparent from the terms of the Order.

Petitioners offer no analytical or legal challenge to this interpretation. They occasionally imply that they take a different view, asserting for example that the District Court "delegated" allocation to the Master, Pet. at 14, and their summary of proceedings suggests some dissatisfaction with the Second Circuit's analysis, *see* Pet. at 10-11. In addressing the merits, however, *id.* at 13-20, they make no effort to marshal these hints into a systematic argument for a different interpretation, let alone a basis for concluding that the Second Circuit committed some error that would warrant review by certiorari.

Nor do Petitioners contend that the District Court could not frame the terms of reference so as to reserve the allocation decision to itself. Plainly it could. The rule expressly provides that an "order of reference . . . may specify or limit the

master's powers and may direct the master to report only upon particular issues or to do or perform particular acts or to receive and report evidence only." Fed. R. Civ. P. 53(c).

The District Court reserved responsibility for allocation under the Order of Reference. Interpretation of that Order presents no "compelling reasons" for review by certiorari, *see* Supreme Court Rule 10. It is therefore unnecessary to reach Petitioners' first question.

II.

THERE IS NO CONFLICT CONCERNING THE STANDARD OF REVIEW FOR CERCLA SECTION 113(f) ALLOCATION

Petitioners' first question presents the narrow issue of whether certiorari is warranted to resolve a conflict between the Second Circuit and two other Courts of Appeals. This "conflict" is illusory. In discussing this issue, Petitioners also assume that a district court has limited ability to review findings and conclusions of a special master. This assumption is incorrect under Rule 53.

A. The Circuits are Not in Conflict Regarding the Standard of Review of CERCLA Equitable Allocation Decisions.

Petitioners contend that equitable allocation of responsibility under CERCLA § 113(f) is treated as a "question of fact" in decisions of two Courts of Appeals, *Boeing Co. v. Cascade Corp.*, 207 F.3d 1177 (9th Cir. 1999) and *Acushnet Co. v. Mohasco Corp.*, 191 F.3d 69 (1st Cir. 1999). In fact, however, these courts review allocation

essentially as the Second Circuit did in this case. They "conflict" only in how they describe their common approach.

CERCLA § 113(f) provides that "[i]n resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." 42 U.S.C. § 9613(f)(1). District courts have broad equitable discretion to allocate costs under this provision. *See, e.g., Bedford Affiliates v. Sills*, 156 F.3d 416, 429 (2d Cir. 1998); *Environmental Transportation Systems, Inc. v. ENSCO, Inc.*, 969 F.2d 503, 509 (7th Cir. 1992); *United States v. R.W. Meyer, Inc.*, 932 F.2d 568, 571 (6th Cir. 1991).

In *Boeing*, the Ninth Circuit explained that CERCLA § 113(f) "gives district courts discretion to decide what factors ought to be considered, as well as the duty to allocate costs according to those factors. We reverse only for an abuse of the discretion to select factors, or for clear error in the allocation according to those factors." 207 F.3d at 1187 (footnotes omitted). Contrary to Petitioners' characterization, the Ninth Circuit thus treats the overall allocation as a product of two distinct decisions, each with a distinct standard of review: first, the discretionary selection of relevant equitable factors, and second, the "allocation" that is the product of applying those factors to the facts found.

The Ninth Circuit followed exactly this approach in *Boeing*. The court first held that in deciding to allocate responsibility based on the volume of waste, the district court did not abuse its discretion to choose "factors appropriate in the particular case." *Id.* at 1188. The Ninth Circuit then affirmed the district court's factual finding that the ratio of the parties' volumetric contributions was 70:30, a finding

premised on crediting the defendant's evidence for that ratio rather than the plaintiff's evidence for a different ratio. *Id.* at 1187-88. In doing so, the Ninth Circuit used a familiar "clear error" rubric: "the 70:30 allocation was among the reasonable conclusions supported by the evidence." *Id.* at 1188.

Petitioners' position rests on the Ninth Circuit's statement that it reviewed "the district court's allocation as a finding of fact for clear error," *id.* But in context, it is clear that this statement refers not to the entire Section 113(f) equitable allocation process, but only to the portion of that process in which the equitable factors selected in the court's discretion are applied to relevant facts.

The First Circuit announced an identical standard of review in *Acushnet*, stating that the district judge's "equitable determinations would not be overturned unless he abused his discretion in some fashion, and any underlying findings of fact would be subject to [review for] clear error." 191 F.3d at 80 n.10. The district court had deemed quantity, toxicity and durability of the parties' hazardous materials "highly relevant to fixing an equitable share." *Id.* at 80. The First Circuit noted that the district court "referred to the equitable factors it found most salient," and interpreted the district court's decision as a "holding that, in light of the equitable factors he would apply should he make explicit findings, plaintiffs' evidence showed too little pollution to justify compelling defendants to take on any meaningful share of the response costs." *Id.* This standard and the resulting analysis correspond to those in *Boeing*.

The Second Circuit employed essentially the same approach here. It began with the general proposition that a district court's allocation of response costs will not be

disturbed absent an abuse of the broad discretion afforded by CERCLA § 113(f) to balance the equities. 311 F.3d at 168-69, Pet. App. at 20a (citing *Bedford Affiliates v. Sills*, 156 F.3d 416, 429 (2d Cir. 1998)). It then explained what this meant:

> "A district court 'abuses' or 'exceeds' the discretion accorded to it when (1) its decision rests on an error of law (such as application of the wrong legal principle) *or a clearly erroneous factual finding*, or (2) its decision – though not necessarily the product of a legal error or a clearly erroneous factual finding – cannot be located within the range of permissible decisions." *Zervos v. Verizon New York, Inc.*, 252 F.3d 163, 169 (2d Cir. 2001).

311 F.3d at 169, Pet. App. at 20a-21a (emphasis added).

Though superficially different from the formulations used in *Boeing* and *Acushnet*, this explanation merely articulates the standard in terms of general abuse of discretion concepts. This is apparent from its citation to *Zervos*, a non-CERCLA case in which the Second Circuit systematically analyzed the nature and terms of *de novo*, clear error and abuse of discretion review, *see* 252 F.3d at 168-69. *Zervos* took particular pains with the latter, characterizing it as a "famously slippery" standard. *Id.* at 168 n.4. Neither *Boeing* nor *Acushnet* made any comparable effort to relate the CERCLA allocation review standard to general abuse of discretion principles. But in doing so, the Second Circuit here provided more detailed guidance that places the CERCLA analysis squarely in the mainstream of abuse of discretion doctrine. For example, in holding that "abuse" of discretion may consist of an error of law or a clear error of

fact, *Zervos* relied on Supreme Court precedent. *See* 252 F.3d at 169 & n.5 (citing *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 405 (1990)).

The Second Circuit's discussion of the record in this case confirms that its approach to review of CERCLA allocation decisions is substantively identical to those employed by the First and Ninth Circuits. It first held that the District Court's decision to allocate response costs according to the respective volume and toxicity of the parties' wastes did not "amount[] to an abuse of discretion." 311 F.3d at 172-73, Pet. App. at 28a-29a. For contentions turning on issues of fact, the Second Circuit then employed clear error analysis. *See, e.g.*, 311 F.3d at 172, Pet. App. at 26a-27a (waste volumes), *id.* at 172 n.17, Pet. App. at 28a n.17 (fate of hazardous substances in MSW).

The Second Circuit's approach is also evident from its opinion in *Bedford Affiliates*. There, the court also began with the general proposition that because CERCLA § 113(f) confers broad discretion on district courts, apportionment of cleanup costs will not be overturned "absent an abuse of . . . discretion." 156 F.3d at 429. It twice held that the district court's core decisions about allocation factors did not constitute abuse of that discretion. *See* 156 F.3d at 429 (defendant's active role in creating contamination warranted assigning it greater share); *id.* at 430 (plaintiff's inaction nevertheless justified assigning some share to it). The court then addressed factual contentions in terms of clear error analysis. For example, it rejected an argument based on a proffered inference that a pipe leak predated a defendant's possession of the property, noting that because the defendant "submitted no evidence to show that the pipe actually leaked . . . [before] he took possession, . . . it was not error" to find the defendant solely responsible for discharges from it. *Id.*

On another release theory, the Second Circuit affirmed the district court's conclusion as a "credibility finding" that was "not clearly erroneous." *Id.*

The Second Circuit's approach is thus essentially the same as those employed by *Boeing* and *Acushnet*. All three courts acknowledge that district courts enjoy broad statutory discretion to balance the equities to arrive at an allocation; all three review selection of equitable considerations for abuse of discretion and factual findings for clear error. The Second Circuit's analysis of this common approach in terms of general abuse of discretion standards does not amount to a substantive conflict.

Petitioners rely heavily on the Second Circuit's criticism of one aspect of the *Boeing* decision, *see* 311 F.3d at 170 n.16 (portion of Ninth Circuit's analysis "unpersuasive"), Pet. App. at 22a-23a. This comment focused, however, on Petitioners' citation of *United States v. Alcan Aluminum Corp.*, 990 F.2d 711 (2d Cir. 1993) and *In Re Bell Petroleum Servs., Inc.*, 3 F.3d 889 (5th Cir. 1993). As the Second Circuit noted, those decisions involved the divisible harm defense under CERCLA § 107, 42 U.S.C. § 9607, under which "a potentially responsible party may avoid joint and several liability if it can prove the environmental harm at a site is divisible." 311 F.3d 170 n.16, Pet. App. at 22a-23a. As the Second Circuit explained, this kind of "apportionment" is a finding of fact guided by principles of causation, and hence "inapposite" to equitable allocation under Section 113(f). *Id.* Although Petitioners allude to *Alcan* and *Bell Petroleum*, *see* Pet. at 16, they do not suggest that the Second Circuit erred in distinguishing them on this basis.

In the same comment, the Second Circuit acknowledged language in *Boeing*, discussed above, suggesting that "allocation" is a question of fact. But the Second Circuit noted that the Ninth Circuit relied on *Alcan* and *Bell Petroleum* in this connection. Having concluded that those precedents were "inapposite" to § 113(f) allocation, the Second Circuit deemed *Boeing* "unpersuasive" to that extent. 311 F.3d at 170 n.16, Pet. App. at 23a.

This comment on *Boeing* does not alter the conclusion that there is no real conflict among these circuits on the question Petitioners present. The three courts do not otherwise take different approaches to review of allocation decisions. Indeed, in the same footnote, the Second Circuit cited the *Boeing* court's distinction between abuse of discretion review for selection of equitable factors and clear error review for "allocation according to those factors." 311 F.3d at 170 n.16, Pet. App. at 23a. At most, the Second Circuit's discussion of *Boeing* highlights an internal inconsistency in the Ninth Circuit's terminology.

The three decisions on which Petitioners rely are not "in conflict" to any meaningful extent. The standards of review they announce and employ are essentially equivalent, if not functionally identical. The differences among them are semantic at most and do not amount to conflicting views on "the same important question." Supreme Court Rule 10(a).

B. There is No Conflict Regarding the Standard of Review of CERCLA Allocation Decisions by District Courts Following Factfinding Before Special Masters under Rule 53.

Boeing and *Acushnet* address only appellate review of allocation by a district court acting as the fact finder in the first instance. They are of dubious relevance where, as here, a district court refers a case to a special master for fact finding. In such cases, the scope of review is largely a function of a Rule 53 analysis on which there is no conflict in authority.

In discussing their first question, Petitioners acknowledge this analysis indirectly by referring to two distinct Rule 53 issues. One is whether a district court, in deciding an objection to a Section 113(f) allocation recommended by a Rule 53 special master, applies the same standard of review applied by a court of appeals on appeal from a district court's Section 113(f) allocation decision. The other is how a court of appeals treats the master's and district court's decisions in a CERCLA allocation case involving a Rule 53 reference.

The Rule 53 analysis is critical to Petitioners' arguments about the CERCLA allocation standard of review because the purported conflict in authority relates only to appellate review of district court decisions. Petitioners therefore implicitly assume that district courts stand in the same relation to Rule 53 special masters as the courts of appeals stand to the district courts. Petitioners do not attempt to advance this proposition directly, however. Rather, they simply assert that the Master was "charged with the duty of identifying the appropriate equitable factors and applying

those factors to the facts," Pet. at 10, that the District Court "delegated" allocation to the Master, Pet. at 14, and finally that the district court's role in reviewing a master's report under Rule 53 is "analogous to that of an appellate court," Pet. at 18.

These assertions and the assumptions on which they rest are inconsistent with Rule 53(e)(2), which expressly provides that a district court "may adopt the report [of the master] or may modify it or may reject it in whole or part or may receive further evidence or may recommit it with instructions." Appellate courts have no such powers, particularly as to receiving additional evidence. In affording greater latitude to the district courts, Rule 53 reflects their ultimate responsibility as the forum of original jurisdiction under Article III: masters may assist the courts but can neither displace nor supplant them.

Petitioners also suggest that a district court cannot address matters on which the master makes no findings. *Cf.* Pet. at 18 (absent erroneous selection or application of allocation factors by master, court "obliged to adopt [his] determination"). They cite no authority for this argument, and the Second Circuit was not persuaded by it.

> We reject this contention as contrary to the Federal Rules of Civil Procedure, which expressly permit a district court to "modify" a special master's report. Fed. R. Civ. P. 53(e)(2); *cf. United States v. Tampa Bay Garden Apartments, Inc.*, 294 F.2d 598, 603 (5th Cir. 1961) ("We do not think the power to modify [under Rule 53(e)(2)] is to be narrowly construed or applied. The power to

> modify is a power to alter or change, and to enlarge and add to as well as to limit, restrict or reduce.").

311 F.3d at 171, Pet. App. at 26a. This argument is a close relative of Petitioners' contention below that by failing to make findings about their waste disposal, the Master impliedly "found" that Respondents had failed to prove any such disposal — a contention the Second Circuit dismissed as "specious" in light of Petitioners' express admissions "that they each dumped a significant volume of MSW at one or, in some cases, both of the landfills." 311 F.3d at 171-72, Pet. App. at 26a. The notion that a district court is powerless to add findings under such circumstances is patently insupportable.

Petitioners also contend that the factual findings of a special master should be "directly reviewed" by a court of appeals. Pet. at 14. But there is no dispute on this point: the Second Circuit agreed that "we review a master's factual findings for clear error, whether or not the district court accepts them." 311 F.3d at 169, Pet. App. at 22a. Indeed, the Second Circuit expressly held one of the Master's findings clearly erroneous. *See* 311 F.3d at 172 n.17, Pet. App. at 28a n.17 (impermissible extrapolation from evidence re fate of hazardous substances in MSW). Petitioners make a superficially similar complaint that "the Second Circuit did not directly review the special master's *conclusions*." Pet. App. at 15 (emphasis added). But Petitioners cite no authority for the proposition that "conclusions" of Rule 53 masters, as opposed to findings of fact, are subject to direct review by the courts of appeals.

Petitioners do not challenge the Second Circuit's holding that under Rule 53, the District Court could make findings on matters the Master failed to address. Nor do they claim

that the District Court's added findings and legal conclusions were in any way in error. They thus have no principled basis to argue that the District Court lacked the ability, notwithstanding the Master's recommendation, to take the final step and allocate a share of response costs to Petitioners in light of the facts and law thus determined.

Against this background, the role of the court of appeals is self-evident: to assure that the district court acts within the scope of its authority under Rule 53. The Second Circuit performed exactly that role in this case.

The Rule 53 considerations here, absent from *Boeing* and *Acushnet*, validate the actions of the District Court and Second Circuit. On these issues, there is not even arguably a conflict that would warrant review by certiorari in this Court.

III.

PETITIONERS DID NOT PRESERVE THE CLAIM THAT A DISTRICT COURT MUST HOLD A HEARING ON AN OBJECTION TO A SPECIAL MASTER'S REPORT

Petitioners' second question relates to the lack of a hearing before the District Court on the Master's report. As a threshold matter, Petitioners concede that this question presents issues of first impression. *See* Pet. at 21. For this reason alone, it involves none of the "compelling reasons" that would justify a writ of certiorari, *see* Supreme Court Rule 10.

A. Petitioners Failed to Preserve Any Right to a Rule 53 Hearing

Petitioners contend that Rule 53(e)(2) mandates a hearing whenever any party objects to a report of a special master, apparently whether a hearing is requested or not. *See* Pet. at 22-23. The authorities they cite do not support this proposition, however, and do not suggest that any claimed hearing right is non-waiveable.

1. No Petitioner Objected to the Report

Petitioners do not claim that they objected to the Master's Report; indeed, they frame their question in terms of the rights of "non-objecting parties," Pet. at 21. They acknowledge that reported decisions address only the right of an objecting party to a hearing under Rule 53. *Id.* at 20-21. They cite no authority holding that a non-objecting party has a right to an oral hearing under Rule 53, and research discloses none.

2. No Petitioner Requested a Rule 53 Hearing

Even an objecting party must request a Rule 53 hearing before it has a right to be heard. *See Graves v. Runyon*, 46 F.3d 1133, 1995 WL 49084, at *2-3 (7th Cir. 1995) (unpublished opinion); *Green v. Brady*, 45 F.3d 439, 1995 WL 4282, at *2 (10th Cir. 1995) (unpublished opinion); *see also Parks v. State of Tennessee*, 881 F.2d 1077, 1989 WL 90792, at *1 (6th Cir. 1989); *cf. In re Chicago, St. Paul & Pac. R. Co.*, 739 F.2d 1169, 1171 (7th Cir. 1984) (hearing requested by motion).

No party made a request for a Rule 53 hearing. Without actually claiming otherwise, Petitioners allude to two

"argument requests" before the District Court.[1] The first was an "oral argument requested" notation on Petitioner Seymour's motion to adopt the Special Master's Report. *See* Pet. at 23. But this request was made, not under Rule 53, but pursuant to a local rule that requires movants to state whether they seek oral argument and expressly provides that "the Judge may, in his or her discretion, deny such request." D. Conn. Loc. Civ. R. 7(a)(1). Such a request therefore could not fail to leave the impression that the District Court had its usual discretion to deny the request. *Cf. United States v. Munger*, 216 F.3d 1074, 2000 WL 900205, at *1 (2d Cir. 2000) (unpublished opinion) (oral hearing not required by due process, or by state statute that provided for decision "after a hearing," where local rule gave court discretion whether to hold argument).

Petitioners also cite their request for a hearing on their motion for reconsideration of the District Court's decision rejecting the Master's conclusion. *See* Pet. at 23. But at that point, the issue before the District Court was whether to grant reconsideration of its initial decision on objections to the Master's Report. In that posture, the request for a hearing was neither presented under nor governed by Rule 53, and Petitioners did not contend that it was. Moreover, Petitioners sought not just a "hearing," but an opportunity to retry "weeks of evidence" on allocation. Petitioners cite no authority, under Rule 53 or otherwise, that would justify such a request. The District Court rightly rejected it as "inappropriate," Pet. App. at 87a.

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1. Petitioners' references to these requests contradict their concession at oral argument before the Second Circuit that they did not seek a hearing in the District Court on the Master's Report. *See* 311 F.3d at 179, Pet. App. at 39a. Respondents address these references on the merits in the text, but submit that Petitioners should be estopped from relying on them by their contrary representation to the Second Circuit on the same subject.

3. Petitioners Waived the Hearing Issue

Petitioners did nothing to alert the District Court to any claimed mandatory hearing rights under Rule 53. They addressed their "hearing requests" to the discretion of the District Court, mentioning neither Rule 53 nor the notion that a hearing was mandatory. The Second Circuit correctly held that by failing to raise the issue before the District Court, Petitioners waived the right to do so for the first time on appeal. *See* 311 F.3d at 179, Pet. App. at 39a-40a.

Even an objecting party can waive a right to a hearing. *See, e.g., Bio-Medicus, Inc. v. S'holders Comm. in Opp'n to Mgmt. of Bio-Medicus, Inc.*, 608 F.2d 1155, 1158 and n.6 (8th Cir. 1979) (objecting parties waived Rule 53 hearing); *Trout v. Garrett*, 780 F. Supp. 1396, 1402 n.10 (D.C. Cir. 1991) (same); *cf. In re Chicago*, 739 F.2d at 1171 (noting lack of waiver). Petitioners do not contend otherwise.

Petitioners cite three cases for the proposition that a hearing is mandatory regardless of whether anyone requests it. Only one, *Kieffer v. Sears, Roebuck & Co.*, 873 F.2d 954 (6th Cir. 1989), even addresses procedure on objections to reports of Rule 53 masters. But *Kieffer* involved a party that both objected and requested a hearing, and the court's comments on the hearing issue expressly deal with the rights of such a party. *See id.* at 955-56. Indeed, the court noted that it was not deciding whether it would reach the same decision in the absence of a hearing request. *See id.* at 956 n.3. *Kieffer* thus does not preclude waiver by an objecting party — let alone a non-objector — who fails to request a hearing.

The other two decisions cited by Petitioners shed no light on the question. *Southern Natural Gas Co. v. Land, Cullman County*, 197 F.3d 1368 (11th Cir. 1999), did not address whether Rule 53 objections require hearings. It merely related, in reciting the background of the appeal, that the district court held hearings on such objections. *Id.* at 1371. It did not endorse that procedure as a "better practice" or attempt to relate it to the rule, as Petitioners imply, *see* Pet. at 22.

In *Livas v. Teledyne Movible Offshore, Inc.*, 607 F.2d 118 (5th Cir. 1979) (per curiam), no party objected to the special master's report or requested a hearing. The district court adopted the report, however, before receiving the transcript of the hearing before the special master. The Fifth Circuit vacated and remanded, reasoning that the losing plaintiff's appeal was proper despite the lack of an objection because the district judge had an independent obligation under Rule 53 to review the master's findings for clear error, and could not have discharged that obligation without the transcript. *Id.* at 119. The relevance of this decision is unclear, as it does not address the hearing question under Rule 53 at all. Petitioners identify no comparable defect in the District Court's actions here that would excuse their failure to raise the hearing issue.

B. Petitioners Suffered No Harm from Lack of Hearing

The District Court's decision not to hold a hearing was, at most, harmless error. "No error . . . is grounds for granting a new trial or setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice." Fed. R. Civ. P. 61.

The complaining party has the burden to show the error affected its substantial rights, *see Kotteakos v. United States*, 328 U.S. 750, 760 (1946). Harmless error analysis has been applied to failures to hold required hearings in other contexts, including those embracing constitutional rights. *See, e.g., United States v. Dhinsa*, 243 F.3d 635, 656 (2d Cir. 2001) (Confrontation Clause).

Petitioners suggest, citing *Kieffer*, that failure to hold a Rule 53 hearing can never be harmless error. *See* Pet. at 22. But as discussed above, *Kieffer* deals with the rights of parties that object and request a hearing. Petitioners here did neither.

Petitioners identify no adverse effect from the lack of a hearing apart from loss of the abstract opportunity to present their contentions orally. But the merits were exhaustively briefed before the District Court acted: in addition to the initial objections and applications for adoption of the Master's Report, voluminous briefs and rebuttal memoranda were filed over a period of roughly six months. Nothing about this process compromised Petitioners' ability to articulate their positions to the District Court.

Petitioners finally allude to due process concerns, Pet. at 23. But they had ample notice of challenges to the Master's Report and more than adequate opportunity to be heard, albeit in writing. Under these circumstances, the lack of an oral hearing has no due process dimension. The same is true of Petitioners' closing argument *ad absurdum* — that the procedure "condoned by the Second Circuit" will subject prevailing parties to loss of their judgments "without *any* opportunity to be heard by the district court." Pet. at 23 (emphasis added). The Second Circuit's decision poses no such danger because Petitioners by no means lacked "any opportunity" to present their views to the District Court.

CONCLUSION

The Petition presents none of the "compelling reasons" that would warrant review on a writ of certiorari. It should be denied.

Respectfully submitted,

CHRISTOPHER P. MCCORMACK
Counsel of Record
TYLER COOPER & ALCORN, LLP
205 Church Street
New Haven, CT 06509-1910
(203) 784-8200

Attorneys for Respondents
Members of the
Laurel Park Coalition

DAVID E. ROSENGREN
PEPE & HAZARD, LLP
Goodwin Square
Hartford, CT 06103-4302
(860) 522-5175

Attorneys for Respondents
Members of the
Beacon Heights Coalition

Attorneys for Respondents